



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9723-8]

40 CFR Parts 124 and 270

Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending before the Environmental Appeals Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule revises existing procedures for appeals from RCRA, UIC, NPDES, PSD or other final permit decisions that are filed with the Environmental Appeals Board in an effort to simplify and make more efficient the review process, particularly in appeals from permits issued under new source review provisions. Most significantly, the changes reconcile current provisions of the regulation governing appeals, which over time has proven to be somewhat confusing and redundant. The changes will bring the regulation more fully in line with current practice. Under the current rule, a Petitioner is required to file a substantive petition for review demonstrating that review is warranted. The Environmental Appeals Board considers that substantive petition, as well as any briefs filed in response to the petition, to determine whether to grant review. If review is granted, the current rule contemplates that a second substantive round of briefing is begun and another substantive review process occurs. In practice, however, the Board has determined that a second round of briefing generally is unnecessary because in nearly all cases, a decision on the merits can be made based on the substantive briefs already filed. The changes to the rule clarify to practitioners that substantive briefing must be submitted at the outset of the appeal and that one substantive review will occur. Additional briefing may be ordered when the Board determines it

warranted. A number of additional provisions governing procedure are also added to the rule to reflect existing practices that are currently guided by standing orders of the Environmental Appeals Board and its Practice Manual. Revising the regulation to reflect current practice will provide clarity to practitioners before the Board, which will in turn make the appeals process more efficient by avoiding unnecessary filings and Board orders.

DATES: This final rule will become effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Eurika Durr, Clerk of the Board, U.S. Environmental Protection Agency, Environmental Appeals Board (EAB), 1200 Pennsylvania Avenue NW, Mail Code 1103M, Washington, DC 20460-0001; telephone (202) 233-0122; fax number: (202) 233-0121; e-mail address: durr.eurika@epa.gov. For more information regarding this rule, please visit <http://www.epa.gov/eab>.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action is directed to the public in general, and has particular applicability to anyone who seeks review of a RCRA, UIC, NPDES, PSD or other final permit decision under 40 CFR § 124.19 by the Environmental Appeals Board. Because this action may apply to everyone, the Agency has not attempted to describe all the specific entities that may be affected by this action. If

you have any questions regarding the applicability of this action to the particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information?

Electronic copies of this document and certain other related documents are available at <http://www.epa.gov/eab/>.

C. When Will This Rule Become Effective?

This rule will become effective sixty days after the date of publication in the federal register. The sixty days between the date of publication and the effective date will allow the Board to notify current practitioners of the changes, modify its procedural guidance documents and take other measures to implement the rule as appropriate.

II. Background

A. What Action Is the Agency Taking?

The existing rule governing appeals of RCRA, UIC, NPDES, PSD and other applicable final permit decisions is potentially redundant and cumbersome, lacks detailed procedures that would help simplify the permit review process, and is not fully reflective of the Environmental Appeals Board's current practice. EPA is amending the language of the rule to more fully reflect current practice, which is bound by the current language but also guided in large part by Board precedent, Board standing orders, and the Board's Practice Manual.

The amendments to the rule clarify review procedures for practitioners before the Environmental Appeals Board, which will simplify and make more efficient the review process in

all permit appeals filed with the Board under this section, particularly in PSD and other new source appeals. As explained in more detail below, the changes:

- clarify that substantive briefing occurs at the outset of the appeal followed by one substantive review process and that a second round of substantive briefs will not occur as a matter of course, allowing the regulation to more fully reflect current Board practice; and
- add provisions to the rule governing procedures that are currently guided by standing orders of the Environmental Appeals Board and the Board's Practice Manual.

1. Full Briefing During Initial Review by the Environmental Appeals Board

In most permit appeals, the Environmental Appeals Board bases its final decision on the petition(s) filed, the response(s) to the petition, and on the administrative record of the permit decision. Although the current rule provides for a second substantive briefing and review period following a decision to “grant review,” a large majority of the time the Board concludes that additional briefing is unnecessary to determine whether to affirm a permit decision or remand a permit decision to the permitting agency for further consideration. Paragraph (a) of the current rule requires Petitioners to demonstrate that review is warranted in the petition for review. Board precedent, affirmed by the Federal Courts of Appeal, interprets this provision in the rule to require Petitioners to demonstrate substantively why the permit decision warrants review. *See, e.g., In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010) (Order Denying Review), *review denied*, *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1221 (9th Cir.

2012); *In re City of Pittsfield*, NPDES Appeal No. 08-19, at 7, 11-12 (EAB Mar. 4, 2009) (Order Denying Review), review denied, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28, at 9-13 (EAB Jan. 23, 2001) (Order Denying Petitions for Review), review denied, *Mich. Dep't Env'tl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003); see also *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33, 51-53 (EAB 2005).

In cases where the Board finds no error based on its review of the petition, the responses to the petition, and the administrative record, the Board will typically deny review. In cases where the Board finds error based on its initial review, the Board often determines that additional briefing on appeal would not shed further light on the issues and, therefore, determines that a direct remand without additional submissions would be more efficient and appropriate. See *In re D.C. Water and Sewer Auth.*, 13 E.A.D. 714, n.82 (EAB 2008) (remanding after initial review and explaining that “[a]lthough 40 C.F.R. § 124.19(c) contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues” to be addressed on remand); see also, e.g., *In re Amerada Hess*, 12 E.A.D. 1, 21 n.39 (EAB 2005); *In re Rohm and Haas Co.*, 9 E.A.D. 499, 514 n.24 (EAB 2000); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 176 n.73 (EAB 1999); *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 314 n.16 (EAB 1999); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 433 n. 40 (EAB 1997); *In re Chem. Waste Mgmt. of Ind.*, 6 E.A.D. 144, 173 n.28 (EAB 1995); *In re Reinkiewicz*, 4 E.A.D. 61, 67 n.5 (EAB 1992). The utilization of a direct remand, without further briefing, has been a practice of the Agency since before the Board was created. See *In re Chem. Waste Mgmt, Inc.*, 2 E.A.D. 575, 577 (Adm’r 1988).

The Environmental Appeals Board’s long-standing practice of issuing a direct remand in

matters based on errors found in its initial review of a petition stands in contrast to the provision in 40 CFR 124.19(c) that provides for a second round of briefing following a grant of review.

Notwithstanding the requirement to provide a substantive demonstration that review is warranted in the petition for review, the existing regulation contemplates that following the Board's grant of review, public notice of the grant of review must be provided and a briefing schedule established for the appeal, including an invitation to any interested person to file an amicus brief.

Today's revision of §124.19 simplifies the review process and promotes judicial economy by clarifying that one complete round of briefing will occur at the outset of the appeal and by removing the language that refers to a second round of briefing once review has been granted. As always, any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review. With today's revision of the rule, any interested person may file an amicus brief in any permit appeal pending before the Board under part 124 during the initial briefing period within the timeframe and in the manner prescribed by the rule. Notice of all docketed appeals pending before the Environmental Appeals Board is available to the public on the Board's website: www.epa.gov/eab. Nothing in this revision to the rule prevents the Board from ordering additional briefing after the first round in any matter where the Board determines that additional briefing may assist the Board in its deliberations.

Several provisions in parts 124 and 270 reference the granting of review by the Environmental Appeals Board and use the second round of briefing and permit review as a trigger or deadline for other agency action. As such, these provisions are being revised to reflect the clarification that all substantive briefing occurs at the outset of the appeal. Specifically, before today, § 124.19 authorized the Regional Administrator to unilaterally withdraw a permit and prepare a new draft

permit at any time prior to the Board's grant of review under what was § 124.19(c). The provision served to prevent unilateral withdrawal of a permit by the Region after the Environmental Appeals Board had begun substantive consideration of an appeal. This rule revises § 124.19 to allow the Regional Administrator to unilaterally withdraw the permit at any time prior to 30 days after the Regional Administrator files its response to the petition under paragraph (b) of this section. This revision will continue to ensure that unilateral withdrawal of a permit will occur before the Board has devoted significant resources to the substantive consideration of an appeal. Nothing in this regulation prevents the Region from seeking to withdraw the permit by motion at any time.

Additionally § 270.42 (b)(6)(iii) provides for the automatic authorization of certain hazardous waste permit modifications where the Director fails to make a determination on a modification request within the allotted time. That automatic authorization is appealable to the Environmental Appeals Board under § 124.19, as provided in § 270.42(f)(3). The provision authorizing the appeal also provides that "the permittee may continue to conduct the activities pursuant to the automatic authorization until the appeal has been granted pursuant to § 124.19(c), notwithstanding the provisions of § 124.15(b)." Because today's rule modifies the appeal procedures to eliminate a second round of substantive review after the grant of review, § 270.42(f)(3) must be modified as well. Accordingly, the provision is modified to allow the permittee to conduct activities pursuant to automatic authorization until a final determination, if any, is made by the Environmental Appeals Board to grant review and remand the permit. The revision is consistent with the original provision in that it allows the permittee to continue to conduct activities described in the modification request pursuant to automatic authorization until the Board determines review is warranted.

Section 270.155(a) authorizes appeals to the Environmental Appeals Board from decisions to approve or deny a remedial action plan (RAP) permit under RCRA. That provision historically has required that specific notice be given to the public of the Environmental Appeals Board's grant of review of any RAP decision, and an opportunity provided for any interested person to participate in the second (substantive review) stage of the appeal. Because today's revision of § 124.19 clarifies that the substantive review of a petition is based on one complete round of briefing at the outset of the appeal, the rule also clarifies that all interested persons in any appeal under § 124.19, including those appeals authorized under § 270.155, may file an amicus brief during the initial briefing period within the timeframe and in the manner prescribed by the rule. Notice of a final decision to approve or deny a RAP is provided under § 270.150, and such notice includes the procedures for appealing the decision under § 270.155. Additionally, as provided above, notice of all docketed appeals pending before the Environmental Appeals Board is available to the public on the Board's website: www.epa.gov/eab. Thus, the provision in § 270.155(a), which provides for specific notice of the second stage of the appeal process that is being eliminated, is no longer necessary and is also being deleted.

2. Procedural Additions to the Rule

Practitioners before the Environmental Appeals Board in permit appeals currently are guided by Board precedent, standing orders of the Board, and the Board's Practice Manual. Current regulations do not provide the parameters for filing documents before the Board, such as where to file, how to file, when to file, as well as any content requirements or limits to what is filed. The revisions adopted today are intended to codify current procedural practices, clarify existing review procedures, and simplify the permit review process. Practitioners before the Board will benefit from the greater clarity and efficiency in these procedural rules, as will the

Agency. Specific changes are summarized below.

In matters where the permit applicant is not the petitioner in an appeal, the petitioner must notify the permit applicant when a petition is filed, and the permit applicant's deadline for filing a response is specified in the regulation. This change eliminates the current practice that typically involves the permit applicant filing a motion to participate in the appeal, which the Board typically grants, followed by filing a substantive brief according to the Board's briefing schedule. Allowing participation of the permit applicant by rule and specifying a response brief deadline will streamline and make more efficient the briefing process for permit applicants.

When a petition is filed, the Environmental Appeals Board typically sends a letter to the permit issuer requesting a response to the petition and requiring the permit issuer to submit its response and a certified index to the administrative record by a date certain. This rule adds procedures that require a petitioner to serve notice of the petition on the permit issuer when the petition is filed. The rule also requires the permit issuer to submit a response to the petition, as well as a certified index of the administrative record and relevant portions of the record, by a date certain. This eliminates the need for the Board to notify the permit issuer and facilitates an earlier response deadline, making the process more efficient for the permit issuer and the Board.

The changes to the rule also impose briefing procedures and deadlines for interested state or tribal authorities that are located where the permitted facility or site is located or proposed to be located (if that authority is not the permit issuer), as well as for any person(s) interested in filing an amicus brief. Again, the briefing deadlines and explicit authorization to file are intended to streamline and make more efficient the appeal process, by removing the need to request permission from the Board to participate, and eliminating the corresponding additional time

needed to grant participation and to impose briefing schedules later in the process.

Procedures for PSD and other new source review appeals are contained in the Environmental Appeals Board's April 19, 2011, standing order. *See* Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB Apr. 19, 2011), *available at* www.epa.gov/eab. These procedures were adopted "to facilitate [the] expeditious resolution of NSR appeals, while simultaneously giving fair consideration to the issues raised in any given matter[.]" *Id.* at 2. In effect, the procedures simplify and make more efficient the review process in PSD and other new source appeals (including OCS appeals) by imposing certain presumptions, tighter deadlines, briefing limitations, and other measures. Today's rule incorporates many of these procedures into the regulation.

To date, practitioners before the Environmental Appeals Board have had little guidance on the form and content of submissions to the Board. The revised rule adds provisions imposing procedural rules governing the content and form of filings for briefs and motions practice. This will improve the quality and consistency of filings before the Board, which will also contribute to greater efficiency.

The revised rule clarifies existing filing requirements and procedures that are currently found in the Board's standing orders and in the Board's Practice Manual, all of which may be found on the Board's website. These include procedures for both filing paper documents and for electronic filing. The procedures also address the service of notice on participants of documents filed, including the availability of electronic service. This portion of the rule will also provide

greater clarity and efficiency to the appeals process.

The revised rule also adds a provision clarifying the Board's inherent authority to manage its docket in the most meaningful and efficient manner possible, including the ability to impose procedural sanctions for failure to comply with Board orders and rules. The language clarifying this authority is consistent with the express language found in regulations pertaining to enforcement appeals before the Environmental Appeals Board. *See* 22 C.F.R. § 22.4(a)(2). The language is also consistent with Board precedent. *See In re Peabody Western Coal Co.*, CAA Appeal No. 10-01 (EAB Aug. 13, 2010) (Order Granting Motion for Voluntary Remand) (articulating Board's inherent authority to rule on motions and fill other "gaps" in its procedural rules); *see also, e.g., In re MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03 (EAB Jan. 8, 2010) (Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference) (imposing page-limit sanction against permit issuer and ordering appearance at a status conference in response to "systematic failure to timely assemble the administrative record, provide representation and defend a permit issued"); *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06 (EAB May 21, 2009) (Order Denying Motion to Participate) (initially denying amici's motion to participate filed two months after the deadline for submission without explanation or justification). Further support for the Board's inherent authority to manage its docket may be found in general and well-established principles of administrative law. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-44 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."); *see also*

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970) (explaining that it is “always within the discretion of * * * an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”). The Board's inherent authority to manage its docket includes the authority to relax or suspend, for good cause, the procedural requirements prescribed by these rules or Board order. *See In re Circle T Feedlot, Inc.*, NPDES Appeals Nos. 09-02 & 09-03, slip op at 11 (EAB Jun. 7, 2010).

Finally, current regulations allow a petitioner to challenge “any condition of a permit decision.” 40 CFR 124.19(a). The Environmental Appeals Board historically and consistently has construed “any condition of the permit decision” to include not only specific permit conditions, but also the permit decision in its entirety, whether based on alleged substantive or procedural defects. *See, e.g., In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 5 n.1 (EAB June 7, 2010), 14 E.A.D. ____ (citations omitted) (challenging the permit in its entirety based on the permit issuer’s alleged lack of authority to issue the permit); *In re Russell City Energy Ctr.*, PSD Appeal No. 08-01, slip op. at 21-25 (EAB July 29, 2008), 14 E.A.D. ____ (considering adequacy of public notice); *In re Weber*, #4-8, 11 E.A.D. 241, 245 (EAB 2003) (considering timeliness of response to comments); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 189 (EAB 2006) (considering, among other things, the alleged failure to include an emission limit for fluoride). The Board’s extension of review to include challenges broader than ones specific to a permit condition is consistent with the language in 40 CFR 124.15(a), which defines a permit decision as a “final decision to issue, deny, modify, revoke and reissue, or terminate a permit.” A petitioner challenging the decision to deny a permit, for example, could not identify specific

permit “conditions” being challenged; rather, such petitioner would challenge the overall decision to deny the permit. Thus, the Board has reviewed permit decisions where the petitioner did not challenge a specific permit condition, but instead challenged the permit as a whole.

On the other hand, the Environmental Appeals Board has also denied review of permit decisions where the petition for review failed to identify any specific permit condition being challenged. Such denial of review has consistently been based on a petitioner’s failure to identify – with any specificity – any error of fact or law warranting review. *See, e.g., In re LCP Chemicals – New York*, 4 EAD 661, 664-65 (EAB 1993) (denying review of certain issues for which petitioner had failed to identify specific permit conditions and stating that, “[a]bsent any references to the specific permit conditions at issue, *and* a discussion as to why the Region’s decision to impose those conditions warrants review, this Board has no basis for granting review.”) (emphasis added); *In re Envotech, L.P.*, 6 EAD 260, 269 (EAB 1996) (dismissing a petition that raised the issue of strict liability but did not explain what permit condition was implicated by the doctrine of strict liability or how the doctrine of strict liability established that the region erred in granting the permit); *see also, e.g., In re Peabody W. Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16, slip op. at 32 n.36 (EAB Aug. 31, 2011) (dismissing several issues as “vague” and “unsubstantiated” where it was unclear how the issues raised related to any conditions of the permit that petitioner was attempting to challenge (citing *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 61 (EAB Dec. 15, 2009) (explaining that, because petitioner bears the burden of demonstrating that review is warranted, the Board “will not entertain vague or unsubstantiated claims”)); *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001) (denying review where petitioner raised vague and unsubstantiated concerns and failed to

point to any clearly erroneous findings of fact or conclusions of law in the Region's permitting decision or to identify any specific permit conditions that gave rise to those concerns)).

Today's revision to the rule therefore clarifies that, consistent with well-established precedent, petitioners must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. This revised language is intended to capture permit challenges that are within the Environmental Appeals Board's existing scope of review, but that are not necessarily tied to a specific permit condition; the revised language is not intended to expand the Board's existing scope of review. As always, such challenges must demonstrate that the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous, or an exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review. Additionally, the rule incorporates the precedential requirement that petitions not only demonstrate that any issue raised in the petition was raised previously during the public comment period (to the extent required), but also that the petition addresses any response by the permit issuer and explain why that response was clearly erroneous or otherwise warrants review. *See, e.g., In re Prairie State Generating Co., LLC*, 13 E.A.D. 1, 109 (EAB 2006); *see also, e.g. In re Pittsfield*, NPDES Appeal No. 08-19, slip op. at 6-9, 11 (EAB Mar. 4, 2009), *aff'd*, 614 F.3d 7 (1st Cir. 2010).

In addition, EPA is clarifying a provision in section 124.19 addressing when final agency action occurs following the disposition of an appeal by the Environmental Appeals Board. Sections 124.15(a) and 124.19(f) of EPA's existing regulations both use the term "final permit decision." Some parties have interpreted the use of the term "final permit decision" in the first

sentence of section 124.19(f)(1) to describe a “final permit decision” previously issued under section 124.15 rather than an additional final permit decision issued by the Regional Administrator after any administrative review proceedings under section 124.19 are exhausted. EPA generally has applied the latter reading based on the second sentence of section 124.19(f)(1), but some EPA offices and members of the public have occasionally misunderstood the meaning of this provision. In some instances, this has led to inconsistent actions within EPA and disputes over the reading of section 124.19(f) between EPA and parties seeking judicial review of permits issued under Part 124. Thus, in order to avoid further disputes and ensure consistency across EPA offices that issue permits under Part 124, we are revising the relevant language in section 124.19 to make more clear that final agency action does not occur under 124.19 until the Regional Administrator issues a subsequent “final permit decision” under section 124.19 *after* administrative review proceedings are exhausted. This revised text now appears in section 124.19(l)(2).

B. What Is the Agency’s Authority for Taking This Action?

EPA is issuing this document under its general rulemaking authority, Reorganization Plan No. 3 of 1970 (5 U.S.C. app.).

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(3)(A), provides that “rules of agency organization, procedure, or practice” are exempt from notice and comment requirements. The action the Agency is taking today involves revisions to the Environmental Appeals Board’s procedural rules to clarify existing practices and procedures that are applicable in

permit appeals filed with the Environmental Appeals Board. These revisions fall under the exemption provided in APA § 553(b)(3)(A). Accordingly, EPA is not taking comment on this action.

III. Statutory and Executive Order Reviews

This action involves revisions to the Environmental Appeals Board's procedural rules to clarify existing practices and procedures that are applicable in permit appeals filed with the Environmental Appeals Board. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Because this action is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) or sections 202 and 205 of the Unfunded Mandates Reform Act of 1999 (UMRA) (Pub. L. 104-4). In addition, this action does not significantly or uniquely affect small governments. This action does not create new binding legal requirements that substantially and directly affect Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). This action does not have significant Federalism implications under Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," (62 FR 19885, April 23, 1997), because it is not economically significant. This action is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action does not involve technical standards; thus the requirements of § 12(d) of the National Technology Transfer and

Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Congressional Review Act, 5 U.S.C 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. § 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects

40 CFR Part 124

Administrative Practice and Procedures

40 CFR Part 270

Environmental Protection, Hazardous Waste

Dated: January 14, 2013.

Lisa P. Jackson,

Administrator.

■ For the reasons stated in the preamble, the Environmental Protection Agency amends title 40

parts 124 and 270 of the Code of Federal Regulations as follows:

PART 124 – PROCEDURES FOR DECISIONMAKING

- 1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et. seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et. seq.*; Clean Water Act, 33 U.S.C. 1251 *et. seq.*; Clean Air Act, 42 U.S.C. 7401 *et. seq.*

2. Section 124.10 is amended by removing paragraph (a)(1)(iv) and redesignating paragraphs (a)(1)(v) through (a)(1)(vi) as paragraphs (a)(1)(iv) through paragraphs (a)(1)(v), respectively.

- 3. Paragraph (b)(1) of § 124.16 is revised to read as follows:

§ 124.16 Stays of contested permit conditions.

* * * * *

(b) *Stays based on cross effects.* (1) A stay may be granted based on the grounds that an appeal to the Administrator under § 124.19 of one permit may result in changes to another EPA-issued permit only when each of the permits involved has been appealed to the Administrator.

* * * * *

- 4. Section 124.19 is revised to read as follows:

§ 124.19 Appeal of RCRA, UIC, NPDES and PSD Permits.

(a) *Petitioning for review of a permit decision.* (1) *Initiating an appeal.* Appeal from a RCRA, UIC, NPDES, or PSD final permit decision issued under § 124.15 of this part, or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29 of this chapter, is commenced by filing a petition for review with the Clerk of the Environmental Appeals Board within the time prescribed in paragraph (a)(3) of this section.

(2) *Who may file?* Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section.

Additionally, any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the proposed draft permit.

(3) *Filing deadline.* A petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of a RCRA, UIC, NPDES, or PSD final permit decision under § 124.15 or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29 of this chapter. A petition is filed when it is received by the Clerk of the Environmental Appeals Board at the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section.

(4) *Petition contents.* (i) In addition to meeting the requirements in paragraph (d), a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on:

(A) A finding of fact or conclusion of law that is clearly erroneous, or

(B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

(ii) Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was

raised during the public comment period (including any public hearing) to the extent required by § 124.13. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13. Additionally, if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review.

(b) *Response(s) to a petition for review.* (1) In a PSD or other new source permit appeal, the Regional Administrator must file a response to the petition for review, a certified index of the administrative record, and the relevant portions of the administrative record within 21 days after the filing of the petition.

(2) In all other permit appeals under this section, the Regional Administrator must file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within 30 days after the filing of a petition.

(3) A permit applicant who did not file a petition but who wishes to participate in the appeal process must file a notice of appearance and a response to the petition. Such documents must be filed by the deadlines provided in paragraph (b)(1) or (2) of this section, as appropriate.

(4) The State or Tribal authority where the permitted facility or site is or is proposed to be located (if that authority is not the permit issuer) must also file a notice of appearance and a response if it wishes to participate in the appeal. Such response must be filed by the deadlines provided in paragraph (b)(1) or (2) of this section, as appropriate.

(c) *Replies.* (1) In PSD and other new source permit appeals, the Environmental Appeals Board will apply a presumption against the filing of a reply brief. By motion, petitioner may seek leave

of the Environmental Appeals Board to file a reply to the response, which the Environmental Appeals Board, in its discretion, may grant. The motion must be filed simultaneously with the proposed reply within 10 days after service of the response. In its motion, petitioner must specify those arguments in the response to which petitioner seeks to reply and the reasons petitioner believes it is necessary to file a reply to those arguments. Petitioner may not raise new issues or arguments in the motion or in the reply.

(2) In all other permit appeals under this section, petitioner may file a reply within 15 days after service of the response. Petitioner may not raise new issues or arguments in the reply.

(d) *Content and form of briefs.* (1) *Content requirements.* All briefs filed under this section must contain, under appropriate headings:

- (i) A table of contents, with page references;
- (ii) A table of authorities with references to the pages of the brief where they are cited;
- (iii) A table of attachments, if required under paragraph (d)(2) of this section; and
- (iv) A statement of compliance with the word limitation.

(2) *Attachments.* Parts of the record to which the parties wish to direct the Environmental Appeals Board's attention may be appended to the brief submitted. If the brief includes attachments, a table must be included that provides the title of each appended document and assigns a label identifying where it may be found (e.g., Excerpts from the Response to Comments Document . . . Attachment 1).

(3) *Length.* Unless otherwise ordered by the Environmental Appeals Board, petitions and response briefs may not exceed 14,000 words, and all other briefs may not exceed 7,000 words. Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, filers may comply with a 30-page limit for petitions and response briefs, or a 15-page

limit for replies. Headings, footnotes, and quotations count toward the word limitation. The table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of compliance with the word limitation, and any attachments do not count toward the word limitation. The Environmental Appeals Board may exclude any petition, response, or other brief that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board to file a longer brief. Such requests are discouraged and will be granted only in unusual circumstances.

(e) *Participation by amicus curiae.* Any interested person may file an amicus brief in any appeal pending before the Environmental Appeals Board under this section. The deadline for filing such brief is 15 days after the filing of the response brief, except that amicus briefs in PSD or other new source permit appeals must be filed within 21 days after the filing of the petition. Amicus briefs must comply with all procedural requirements of this section.

(f) *Motions.* (1) *In general.* A request for an order or other relief must be made by written motion unless these rules prescribe another form.

(2) *Contents of a motion.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion. In advance of filing a motion, parties must attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and must indicate in the motion the attempt made and the response obtained.

(3) *Response to motion.* Any party may file a response to a motion. Responses must state with particularity the grounds for opposition and the legal argument necessary to support the motion. The response must be filed within 15 days after service of the motion unless the Environmental Appeals Board shortens or extends the time for response.

(4) *Reply.* Any reply to a response filed under paragraph (f)(3) of this section must be filed within 10 days after service of the response. A reply must not introduce any new issues or arguments and may respond only to matters presented in the response.

(5) *Disposition of a motion for a procedural order.* The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.

(g) *Timing of motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

(h) *Oral argument.* The Environmental Appeals Board may hold oral argument on its own initiative or at its discretion in response to a request by one or more of the parties. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument should be permitted. The Environmental Appeals Board will apply a presumption against oral argument in PSD or other new source permit appeals. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(i) *Filing and service requirements.* Documents filed under this section, including the petition for review, must be filed with the Clerk of the Environmental Appeals Board. A document is filed when it is received by the Clerk of the Environmental Appeals Board at the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section.

(1) *Caption and other filing requirements.* Every document filed with the Environmental Appeals Board must specifically identify in the caption the permit applicant, the permitted facility, and the permit number. All documents that are filed must be signed by the person filing the

documents or the representative of the person filing the documents. Each filing must also indicate the signer's name, address, and telephone number, as well as an e-mail address, and facsimile number, if any.

(2) *Method of filing.* Unless otherwise permitted under these rules, documents must be filed either electronically, by mail, or by hand delivery. In addition, a motion or a response to a motion may be submitted by facsimile if the submission contains no attachments. Upon filing a motion or response to a motion by facsimile, the sender must, within one business day, submit the original copy to the Clerk of the Environmental Appeals Board either electronically, by mail, or by hand-delivery.

(i) *Electronic filing.* Documents that are filed electronically must be submitted using the Environmental Appeals Board's electronic filing system, subject to any appropriate conditions and limitations imposed by order of the Environmental Appeals Board. All documents filed electronically must include the full name of the person filing below the signature line. Compliance with Environmental Appeals Board electronic filing requirements constitutes compliance with applicable signature requirements.

(ii) *Filing by U.S. Mail.* Documents that are sent by U.S. Postal Service (except by U.S. Express Mail) must be sent to the official mailing address of the Clerk of the Environmental Appeals Board at: U.S. Environmental Protection Agency, Environmental Appeals Board, 1200 Pennsylvania Avenue, NW, Mail Code 1103M, Washington, DC 20460-0001. The original and two copies of each document must be filed. The person filing the documents must include a cover letter to the Clerk of the Environmental Appeals Board clearly identifying the documents that are being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number and, if

available, fax number and e-mail address.

(iii) *Filing by hand delivery.* Documents delivered by hand or courier (including deliveries by U.S. Express Mail) must be delivered to the Clerk of the Environmental Appeals Board at: U.S. Environmental Protection Agency, Environmental Appeals Board, EPA East Building, 1201 Constitution Avenue, NW, Room 3334, Washington, DC 20004. The original and two copies of each document must be filed. The person filing the documents must include a cover letter to the Clerk of the Environmental Appeals Board clearly identifying the documents being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number and, if available, fax number and e-mail address.

(3) *Service requirements.* Petitioner must serve the petition for review on the Regional Administrator and the permit applicant (if the applicant is not the petitioner). Once an appeal is docketed, every document filed with the Environmental Appeals Board must be served on all other parties. Service must be by first class mail, or by any reliable commercial delivery service. Upon agreement by the parties, service may be made by facsimile or electronic means.

(4) *Proof of service.* A certificate of service must be appended to each document filed stating the names of persons served, the date and manner of service, as well as the electronic, mailing, or hand delivery address, or facsimile number, as appropriate.

(j) *Withdrawal of permit or portions of permit by Regional Administrator.* The Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review under paragraph (b) of this section, may, upon notification to the Environmental Appeals Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit must

proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit that are not withdrawn and that are not stayed under § 124.16(a) continue to apply. If the Environmental Appeals Board has held oral argument, the Regional Administrator may not unilaterally withdraw the permit, but instead must request that the Environmental Appeals Board grant a voluntary remand of the permit or any portion thereof.

(k) *Petitioner request for dismissal of petition.* Petitioner, by motion, may request to have the Environmental Appeals Board dismiss its appeal. The motion must briefly state the reason for its request.

(l) *Final disposition and judicial review.* (1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.

(2) For purposes of judicial review under the appropriate Act, final agency action on a RCRA, UIC, NPDES, or PSD permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph. A final permit decision must be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that the petition for review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(3) The Regional Administrator must promptly publish notice of any final agency action regarding a PSD permit in the Federal Register.

(m) *Motions for reconsideration or clarification.* Motions to reconsider or clarify any final disposition of the Environmental Appeals Board must be filed within 10 days after service of that order. Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for clarification must set forth with specificity the portion of the decision for which clarification is being sought and the reason clarification is necessary. Motions for reconsideration or clarification under this provision must be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration or clarification directed to the Administrator, rather than the Environmental Appeals Board, will not be considered, unless such motion relates to a matter that the Environmental Appeals Board has referred to the Administrator pursuant to § 124.2 and for which the Administrator has issued the final order. A motion for reconsideration or clarification does not stay the effective date of the final order unless the Environmental Appeals Board specifically so orders.

(n) *Board authority.* In exercising its duties and responsibilities under this part, the Environmental Appeals Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with this part or an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding. Additionally, for good cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order.

(o) *General NPDES permits.* (1) Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of a general permit in further Agency proceedings. Instead, they may do either of the following:

(i) Challenge the general permit by filing an action in court; or

(ii) Apply for an individual NPDES permit under § 122.21 as authorized in § 122.28 of this chapter and may then petition the Environmental Appeals Board to review the individual permit as provided by this section.

(2) As provided in § 122.28(b)(3) of this chapter, any interested person may also petition the Director to require an individual NPDES permit for any discharger eligible for authorization to discharge under an NPDES general permit.

(p) The Environmental Appeals Board also may decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

■ 5. Paragraph (b)(1) of § 124.60 is amended by removing the reference to “§ 124.19(f)” in the first sentence and adding in its place “§ 124.19(k)(2)”.

PART 270 – EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

■ 6. The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

■ 7. Paragraph (f)(3) of § 270.42 is revised to read as follows:

§ 270.42 Permit modification at the request of permittee.

* * * * *

(f) * * *

(3) An automatic authorization that goes into effect under paragraph (b)(6)(iii) or (v) of this section may be appealed under the permit appeal procedures of 40 CFR 124.19; however, the permittee may continue to conduct the activities pursuant to the automatic authorization unless and until a final determination is made by the Environmental Appeals Board to grant review and remand the permit decision.

* * * * *

■ 8. Paragraph (a) of 270.155 is revised to read as follows:

§ 270.155 May the decision to approve or deny my RAP application be administratively appealed?

(a) Any commenter on the draft RAP or notice of intent to deny, or any participant in any public hearing(s) on the draft RAP, may appeal the Director's decision to approve or deny your RAP application to EPA's Environmental Appeals Board under § 124.19 of this chapter. Any person who did not file comments, or did not participate in any public hearing(s) on the draft RAP, may petition for administrative review only to the extent of the changes from the draft to the final RAP decision. Appeals of RAPs may be made to the same extent as for final permit decisions under § 124.15 of this chapter (or a decision under § 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit).

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